

VERNON C. CLUCK
Claimant

ATCHISON CASTING CORP.
Respondent
Self-Insured

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1. Whether claimant suffered personal injury by accident arising out of and in the course of his employment in Docket Number 204,983. If so, on what date.
2. Whether proper notice was given of the accidental injury, if any.
3. Whether written claim was timely filed of the accidental injury, if any.

4. Whether claimant suffered an intervening accident at work for which there has already been a Board finding of no notice.¹

Although respondent raises notice and written claim as issues, the ALJ's Order states, "The Respondent does not deny that notice was given as to the first alleged series." Furthermore, at page four of the transcript of the June 12, 2002 preliminary hearing, counsel for respondent admits notice and written claim were timely made for the series of accidents ending August 31, 1995.

Findings of Fact and Conclusions of Law

Claimant worked at the same foundry in Atchison, Kansas from February 3, 1964 until May 26, 2000. In June 1991 the foundry was sold by Rockwell International to Atchison Casting Corporation, the respondent herein. Claimant alleges he suffered biaural hearing loss as a result of his employment with respondent by a series of accidents each and every working day through May 26, 2000, the last day he worked before taking retirement. Respondent does not dispute that claimant suffered noise induced hearing loss while working at the plant, but disputes the dates when the hearing loss occurred.

This case involves two docketed claims by claimant against respondent. The Application for Hearing (Form K-WC E-1) in Docket Number 204,983 was filed September 5, 1995 and alleged a hearing loss in both ears from noise exposure at work. The accident date was alleged as a "Series through present - 8/31/95."

On May 8, 2001, claimant filed a second Application for Hearing alleging injuries to claimant's "neck, back, right leg, both upper extremities, both shoulders, arms, hands, carpal tunnel syndrome, hearing loss" as a result of his "regular job duties" by "repetitive use/cumulative trauma - series of accidents through last day at work 5/26/00." This second claim was assigned Docket Number 265,534. Although other injuries were alleged, this appeal is concerned with only the hearing loss. In that regard, there are some musings in the record that suggest claimant's counsel was amending the claim to allege a single series of accidents.² Regardless of whether an amendment was requested, as to the hearing loss, the two claims combine to allege a series of accidents each and every day claimant worked for respondent.

¹ Application of Respondent and Self-Insured for Review Before the Workers Compensation Appeals Board and Docketing Statement (filed July 1, 2002).

² P.H. Trans. at 8, 82-83 and 91-92 (June 12, 2002).

On November 30, 1994, claimant underwent a hearing test at the request of respondent which showed a worsening of his hearing loss over previous tests. In 1995 claimant began using hearing aids in both ears. Respondent provided and paid for the hearing tests and also paid for claimant's hearing aids. Subsequent hearing tests provided to claimant by respondent were equivocal as to a worsening. Based in large part upon this absence of a clear worsening of claimant's hearing loss after August 31, 1995, a member of the Board made a preliminary finding in an Order dated October 31, 2001, that claimant failed to give timely notice of a claim for additional hearing loss in Docket Number 265,534. In that appeal, as in this appeal, the parties focused on the hearing loss claim and not the other alleged injuries.

These two docketed claims now come before the Board as consolidated cases. Respondent contends that the earlier denial of benefits in Docket Number 265,534 precludes an award of benefits for claimant's hearing loss in Docket Number 204,983. Respondent's argument is that the hearing loss claim in Docket Number 265,534 was a subsequent intervening accident which absolves respondent of liability for the earlier series of accidents and injury to claimant's hearing. Respondent also argues that claimant suffered no loss of hearing between June 1991 and August 31, 1995.

The Board finds that claimant suffered a hearing loss as a result of his employment with respondent. There is no question but that respondent had actual knowledge of hearing loss as early as November 30, 1994. Where a worker suffers repetitive trauma injury from a series of accidents, fixing a single date of accident constitutes a legal fiction for purposes of determining a starting date when awarding permanent disability benefits and assessing liability for those benefits. Date of accident is not an issue that the Board has jurisdiction to decide on an appeal from a preliminary hearing order unless a finding is necessary in order to determine whether claimant suffered accidental injury arising out of and in the course of employment, or if notice and/or written claim was timely made.³

Notice and written claim of an accidental injury from repetitive trauma that is given during the time that injury is ongoing or the series of accidents is continuing is sufficient to cover the past, present and future parts of the ongoing series. As to the hearing loss suffered in these two consolidated claims, claimant is alleging a series each and every working day throughout his employment with respondent. Notice and written claim for compensation for hearing loss due to a series of accidents were clearly given in 1995, if not before. Thus, notice was timely, as was written claim.

It is not necessary to decide the dates of claimant's hearing loss to decide the jurisdictional question of whether claimant suffered injury by accident arising out of and in

³ K.S.A. 44-534a; K.S.A. 44-551(b)(2)(A).

the course of his employment. The Board's finding that claimant suffered additional hearing loss after June 1991, renders the question as to what extent claimant suffered additional injury to his hearing after June 1991, through his last day worked on May 26, 2000, a question that goes to the nature and extent of disability. Nature and extent of disability is also not a jurisdictional issue.

As the Board finds claimant's hearing loss worsened between June 1991 and his last day of work, claimant has proven he suffered personal injury by a series of accidents arising out of and in the course of his employment with respondent.

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Order entered by Administrative Law Judge Bryce D. Benedict dated June 17, 2002, should be and is hereby affirmed.

IT IS SO ORDERED.

Dated this _____ day of October 2002.

BOARD MEMBER

c: John B. Rathmel, Attorney for Respondent
John J. Bryan, Attorney for Claimant
Bryce D. Benedict, Administrative Law Judge
Director, Kansas Division of Workers Compensation